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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

CHARLES BELAND,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Brief of Petitioner in Support of Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

Opinion of Court Below

The opinion of the Circuit Court of Appeals for the Fifth Circuit herein was rendered on the 11th day of June, 1942, and is set forth in the record at pages ——. (We do not understand that the same has as yet been officially reported.)

II.

Jurisdiction

(1) The judgment of the Circuit Court of Appeals for the Fifth Circuit, sought to be reviewed herein, is dated and was entered on the 11th day of June, 1942.

Petition for a rehearing was duly filed in said Circuit Court of Appeals and the same denied on August —, 1942.

(2) The statutory provisions which sustain the jurisdiction of this Court is Section 240 (a) of the Judicial Code, Section 347, Title 28 USCA.

(3) The cases and authorities which sustain said jurisdiction among others, are as follows:

Patton v. United States, 281 U. S. 276;
United States v. Gulf Refining Co., 268 U. S. 542;
United States v. Young, 232 U. S. 155.

(4) The decision of the Circuit Court of Appeals for the Fifth Circuit affirming the judgment and sentence of the trial court and its disregard of the mandate of the Circuit Court in Case No. 9601, and the judgment and sentence thereafter of petitioner on allegations set out in a "criminal information" filed by the United States Attorney, and that the said procedure was lawful, and that the said statute was constitutional, and that the punishment imposed *was not ex post facto in its operation*, nor cruel and unusual punishment, was a decision by the Circuit Court of Appeals for the Fifth Circuit contrary to the weight of authorities, contrary to the Due Process Clause of the Fifth Amendment to the Constitution of the United States, contrary to the Eighth Amendment of the Constitution of the United States, contrary to Article 1, Section 9, clause 3 of the Constitution of the United States, and applicable decisions of other courts of ap-

pellate jurisdiction and applicable decisions of this Honorable Court; and said decision by the Circuit Court of Appeals for the Fifth Circuit is such an erroneous decision as to bring this case within the jurisdictional provisions relied upon herein; and for the further reason that the statute involved is discriminatory legislation and has never before been *determined as constitutional* by this Honorable Court, and if not settled now by this Honorable Court may cause irreparable harm and injury to other citizens of the United States if charged under this so-called "Harrison Anti-Narcotic Habitual Criminal Act," Section 2557, (b), (6), (7), Title 26 USCA.

III.

Statement of the Case

The statement of the case has already been summarized and set forth in the preceding petition under I, "*Summary Statement of Matters Involved,*" which, for the sake of brevity, is hereby adopted and made a part of this brief.

Petitioner respectfully shows that on November 7th, 1941, he voluntarily surrendered to the United States Marshal for the Northern District of Texas, at Fort Worth, for the purpose of being sentenced *in accordance with the opinion* of the Circuit Court of Appeals for the Fifth Circuit in Case No. 9601 (*Beland v. United States*, 117 Fed. (2d) 958, cert. denied 313 U. S. 585), and the mandate issued by the said Circuit Court.

The record shows that three days after petitioner had voluntarily surrendered to the United States Marshal, and, to-wit, on the 10th day of November, 1941, *but before imposition of sentence by the trial court in accordance with the opinion of the Circuit Court and mandate*, and, *for the first time*, the United States Attorney for the Northern District of Texas filed what was termed a "criminal information" against petitioner under Section 2557, Title 26 USCA, setting forth that on two previous occasions petitioner had been convicted of unlawfully selling morphine, a derivative of opium, in violation of the laws of the United States. (R. 18-22.)

Petitioner further shows that the two previous convictions complained of in the said information filed under Section 2557, (b) (7) occurred in 1926 and 1935, *prior* to the enactment of the statute herein involved, namely, February 10th, 1939.

On November 11th, 1941, petitioner came into court, was fully apprised of the allegations set out in the information filed against him, acknowledged he was the person named, and that he had been previously convicted as alleged. The record shows a stipulation as to the facts, agreed to by and between counsel for the petitioner and the United States Attorney. (R. 16-17.) The trial court thereupon proceeded to impose a sentence of seven years imprisonment in a penitentiary, said sentence being imposed *solely* upon the allegations set out in the information and under the provisions of the statute here challenged, and was not a sentence imposed *in accordance with the opinion of the Circuit Court.* (R. 24-26.)

In its decision of June 11th, 1942, the Circuit Court of Appeals for the Fifth Circuit affirmed the judgment and sentence of seven years, and by its approval of the trial court's procedure inferentially upheld the said trial court's disregard of the Circuit Court's mandate; and further, the Circuit Court approved the challenged statute, and held that the sentence imposed by the trial court *was not ex post facto.*

This cause covers the question of procedure followed by the trial court in its disregard of the Circuit Court's mandate, and covers *for the first time* before this Honorable Court, so far as we have been able to determine from a careful search of all the authorities, the constitutionality of the statute involved herein.

IV.

Specification of Errors

(1) The Circuit Court of Appeals for the Fifth Circuit erred in holding that the District Court for the Northern District of Texas had the power, authority, and jurisdiction to impose a seven years sentence without complying with the mandate issued by the Circuit Court in Case No. 9601, Beland v. United States, 117 Fed. (2d) 958, cert. denied 313 U. S. 585.

(2) The Circuit Court of Appeals for the Fifth Circuit erred in holding that the judgment and sentence of the District Court was lawful and constitutional.

(3) The Circuit Court of Appeals for the Fifth Cir-

cuit erred in holding that the judgment and sentence imposed by the District Court upon an information was not violative of the laws and the Constitution of the United States and the amendments thereto.

(4) The Circuit Court of Appeals for the Fifth Circuit erred in holding that the judgment and sentence imposed by the District Court was not ex post facto, and that the statute involved was constitutional.

(5) The Circuit Court of Appeals for the Fifth Circuit erred in denying the petition for a rehearing.

(6) The Circuit Court of Appeals for the Fifth Circuit erred for other errors appearing in the record.

—o—

Point A

(Specification of Errors Nos. 1, 2, 3, and 4)

The Circuit Court of Appeals for the Fifth Circuit erred in approving the trial court's action in disregarding the Circuit Court's mandate and assuming jurisdiction and authority to adjudge and impose a seven years sentence upon petitioner on allegations filed in an information, and that the information filed was not violative of petitioner's constitutional rights, and that the statute was lawful and constitutional, and that the punishment imposed was not ex post facto.

—o—

Questions Presented

The questions presented here for determination are: (a) Whether or not a District Court has the power and authority to disregard the mandate of the Circuit Court and proceed to substitute for such mandate a "criminal information" as the cause to be heard, tried, and judgment thereon pronounced; and, (b) whether or not such a proceeding, bottomed upon said "criminal information" is Due Process under the Fifth Amendment to the Constitution of the United States; and, (c) whether or not the statute involved (Section 2557, Title 26 USCA) under which the said information was filed is constitutional; and, (d) if held to be constitutional by this Honorable Court, whether or not the seven years sentence imposed by the trial court was ex post facto.

The statute herein involved, Section 2557, (b) (6) (7) Title 26 USCA (53 Stat. 274) was enacted February 10th, 1939, and embraced on that date in the Internal Revenue Code, and provides as follows:

> "(6) A person who, after having been two times convicted of selling, importing, or exporting, or conspiring to sell, import, or export, opium, cocoa leaves, cocaine, or any salt, derivative, or preparation of opium, cocoa leaves, or cocaine, again sells, imports, or exports or conspires to sell, import, or export, any of the said narcotic drugs, in violation of the laws of the United States, shall, upon conviction of such third offense, or any offense subsequent thereto, be fined not more than $10,000 or imprisoned in a Federal penitentiary for not more than twenty years, or both, in the

discretion of the Court, whenever the fact of such previous convictions is established in the manner prescribed in paragraph 7 of this subsection."

"(7) Whenever it shall appear, after conviction and before or after sentence, that a person convicted of unlawfully selling, importing, or exporting, or conspiring unlawfully to sell, import, or export, any of the narcotic drugs enumerated in paragraph 5 has previously been convicted of unlawfully selling, importing, or exporting, or conspiring unlawfully to sell, import or export, any of said narcotic drugs, in violation of the laws of the United States, it shall be the duty of the United States District Attorney for the district in which such subsequent conviction was had to file an information alleging that the defendant has previously been so convicted, and further alleging the number of such previous convictions. The Court in which the defendant was convicted shall cause the said defendant, whether confined in prison or otherwise, to appear before it and shall apprise him of the allegations of the information and of his right to a trial by jury as to the truth thereof. The Court shall inquire of the defendant whether he is the person who has previously been convicted. If the defendant states he is not such person, or if he refuses to answer or remain silent, a plea of not guilty shall be entered by the Court, and a jury shall be impanelled to determine whether the defendant is the person alleged in the information to have previously been convicted, and the number of such previous convictions. If after a trial on the sole issue of the truth of such allegations the jury determines that the defendant is in fact the person previously convicted as charged in the information, or if he

> acknowledges in open court, after being duly cautioned as to his rights, that he is such person, he shall be punished as prescribed in paragraphs 5 or 6 of this subsection, as the case may be, and the previous sentence of the Court, if any, shall be vacated and there shall be deducted from the new sentence the amount of time actually served under the sentence so vacated."

Petitioner respectfully shows that on November 7th, 1941, he voluntarily surrendered to the Marshal for the purpose of being brought before the original trial court for resentence *in accordance with the opinion* and the mandate of the Circuit Court, and that such resentence involved a conspiracy charge which had theretofore been affirmed by the said Circuit Court. Under the Circuit Court's opinion and mandate, the trial court was bound to put into force and effect, or rather, to impose a sentence upon a conspiracy charge (the 42nd count in the indictment in Case No. 9601). It is contended by petitioner that the trial court's jurisdiction over him extended *only* for the purpose of pronouncing a sentence *in accordance with the opinion of the Circuit Court*, and, that by the very nature of things, the trial court's jurisdiction was limited to that special judicial function, and nothing more.

We are here concerned with what occurred during the four days commencing with petitioner surrendering himself to the jurisdiction of the court in the Northern District of Texas, which ended on November 11th, 1941, with the petitioner sentenced under altogether different proceedings than that directed by the Circuit Court in its mandate. Three days after peti-

tioner had surrendered, and more particularly on the 10th day of November, 1941, a "criminal information" was filed against him by the United States Attorney, drawn under the so-called Harrison Anti-Narcotic Habitual Criminal law, Section 2557, Title 26 USCA, setting forth that he had been convicted of violations of the narcotic laws of the United States twice prior to the affirmed conspiracy judgment in Case No. 9601, and citing therein the information that the two previous convictions occurred first, on November 29th, 1926, and secondly, on January 9, 1935.

Petitioner respectfully calls the attention of this Honorable Court to the dates of the admitted *prior convictions*, for we shall advert to the same later herein.

No judicial action on the part of the trial court took place on November 7th, 8th, 9th, and 10th, 1941, in regard to the Circuit Court's mandate. And, on November 11th, 1941, the fourth day after petitioner's voluntary surrender to custody, instead of carrying out the mandate of the Circuit Court, the trial court proceeded to hear the allegations set out in the "criminal information" and your petitioner found himself sentenced to seven years imprisonment in a penitentiary because a law, passed long after he had served his sentences in 1926 and 1935 provided, so the trial court and the Circuit Court held, that petitioner be further punished by an *augmented sentence* for having previously been convicted of conspiracy *after the passage of the law* here challenged.

Petitioner respectfully submits that this procedure followed by the trial court in disregarding the man-

date of the Circuit Court does violence to the orderly administration of justice. In petitioner's former brief for certiorari before this Honorable Court, 313 U. S. 585, we said: "*The nub of legality in any cause is that form of procedure which in no wise infringes on the rights of the parties.*" And, we quoted Justice Reed's remarks in *Edwards v. United States*, 61 S. Ct. 673, wherein the learned Justice said, speaking for the Court: "*Procedure is the skeleton which forms and supports the whole structure of a case. The lack of a bone mars the symmetry of the body.*"

Petitioner concedes that the action of the trial court in disregarding the Circuit Court's mandate may not be the controlling question here, but it is believed important and deserving of this Honorable Court's scrutiny, touching as it does on orderly Federal Criminal procedure. We have no way of knowing what happened to the Circuit Court's mandate after the trial court sentenced petitioner to a penitentiary term of seven years on the allegations set out in the "criminal information."

Turning to the constitutional rights of petitioner under the Due Process Clause of the Fifth Amendment to the Constitution of the United States, petitioner contends that the information filed by the United States Attorney was not a presentment or an indictment of a Grand Jury. The Fifth Amendment provides that: "*No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.*"

This "criminal information" was not filed, or pre-

sented to the trial court at the time of the original trial, but it was filed one day *prior* to the date when petitioner was to have been resentenced *in accordance with the opinion* of the Circuit Court, namely, November 10th, 1941.

Nor was this "criminal information" pleaded in petitioner's indictment at the time of his arraignment before the trial court.

Careful examination of the information, shows that the convictions set forth therein occurred *long before* the enactment of the statute, in 1926 and 1935. The statute was enacted on February 10th, 1939, as the Circuit Court recites in its opinion; although before reciting this February 10th, 1939, date, the Circuit Court opinion states: " * * * the statute providing for increased punishment for habitual narcotic violators was approved August 12th, 1937." Even were the date of "approval of the statute" binding, the fact remains petitioner's prior convictions occurred in 1926 and 1935, something more than two and one half years elapsing from the date of the last (or second) conviction) to the date when the legislation was approved—and an even longer period elapsing before the statute was enacted into the Internal Revenue Code, February 10th, 1939.

Petitioner respectfully contends that by the terms of the statute punishment is arbitrarily set greater than a year, and in a penitentiary, and therefore, "allegations" in an information filed under said statute take on the character of "offenses" charged under other criminal statutes and by that token must be

construed as an "infamous crime." The Fifth Amendment provides that "infamous crimes" must be charged only by presentment or an indictment of a Grand Jury. Can it reasonably be held that the statute, and the information filed thereunder meets this constitutional requirement? We think not. On the subject of infamous crimes, we respectfully refer this Honorable Court to *Falconi v. United States*, 280 Fed. 766, and the cases therein cited and collated.

For the foregoing reasons, petitioner submits that Due Process did not inure to him when he was brought before the trial court to answer the allegations set out in the "criminal information"; and that the information filed against him was violative of his rights under the Fifth Amendment, i.e., that one cannot be held to answer to serve a prison sentence unless by presentment or indictment of a Grand Jury.

Furthermore, petitioner contends that the punishment imposed, pursuant to the provisions of the statute involved herein, constituted a cruel and unusual form of punishment contrary to the Eighth Amendment to the Constitution of the United States, and was tantamount to *double jeopardy*.

Petitioner respectfully submits that the statute herein involved blatantly carries the stamp of unconstitutionality. By its terms, it supersedes a guaranty laid down in the Fifth Amendment to the Constitution of the United States. By its terms, it augments the punishment theretofore visited upon *a particular class of offenders*, narcotic law violators, and by its terms it

attempts to operate both retroactively and prospectively, unless stricken down by this Honorable Court.

Another important constitutional question arises, dealing with Article 1, Section 9, clause 3 of the Constitution of the United States, which provides: "*No Bill of Attainder or ex post facto law shall be passed.*" If the language used by the Congress in this statute is to be construed as affecting offenses *prior* to the enactment of the statute, which the Circuit Court held that the statute did, we then contend that the same is patently unconstitutional on its face because it operates retroactively and is an ex post facto law. Chief Justice Marshall held, in *Fletcher v. Peck*, 6 Cranch, (U. S.) 87, 138, 3 L. Ed. 162: "An ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed." A very clear definition of ex post facto laws is found in 12 *Corpus Juris*, 1097, 1098, where it is defined as follows: "An ex post facto law is one which imposes punishment for an act which was not punishable when it was committed, *imposes additional punishment*, or changes the rules of evidence, by which *less or different testimony is sufficient to convict.* It is essential to an ex post facto law, therefore, that it relate to criminal matters, *that it be retroactive in its operation* and that it alter the situation of the accused party to his disadvantage." *Burgess v. Salmon*, 97 U. S. 587, 24 L. Ed. 1104; *Duncan v. Missouri*, 152 U. S. 382, 14 S. Ct. 570, 38 L. Ed. 485; *Thompson v. Utah*, 170 U. S. 343, 18 S. Ct. 620; *United States v. Hall*, 2 Wash. 366. (Italics in definition ours.)

Granting the premise that in determining whether a

law is ex post facto or not, the facts in the individual case must be considered, petitioner urges this Honorable Court to consider the main fact that he had been convicted twice *prior to the enactment of the statute*, had paid the penalty imposed upon him, and that the "criminal information" filed against him did not allege that *after* the passage of the statute, he had previously been convicted twice for narcotic law violations.

In its decision, the Circuit Court adopted a unique line of reasoning to uphold the constitutionality of the statute as to its not being ex post facto in its operation by claiming an exemption in the instant case revolving around the date when the legislation was "approved," and when it was enacted into the Internal Revenue Code, as covering the inception and the conclusion of the conspiracy charged in the 42nd count of the indictment. As to this, we have shown herein that regardless of this opinion by the Circuit Court, the fact nevertheless remains that petitioner was charged in the "criminal information" with having previously been convicted twice for narcotic law violations and that said convictions occurred *long before the passage of the act.*

Petitioner respectfully submits that the Circuit erroneously approved the statute and its intentions by declaring that "the statute before us provides for none but future crimes," and yet we find here a set of allegations reaching out to ensnare petitioner covering acts committed long before the statute was "approved" and enacted into the Internal Revenue Code.

We concede that the language in the statute, "previously been convicted" is a broad statement, susceptible of interpretations that might lead to the conclusion that Congress intended all prior convictions of narcotic law violators, prior to the enactment of this law, would be included thereunder.

However, a careful search of the authorities, and what information is available as to the history of this legislation fails to produce any evidence that Congress intended this challenged statute to operate retroactively. Certainly the Circuit Court would have so pointed out in its opinion, had there been some evidence to show such an intention by the Congress. In the absence of such evidence, and following the general rule of criminal law covering ex post facto laws, it is safe to hold that the challenged statute here was intended to cover subject matter *after* its enactment, and not subject matter *prior* to its enactment. Thus, if for any reason this Honorable Court should hold the statute constitutional, basing its decision on former decisions affecting habitual criminal laws in the states of Massachusetts and West Virginia, we respectfully urge this Court not to overlook the special facts attendant herein where the allegations in the information dealt with previous convictions *prior* to the passage of this challenged section, and that the penalty imposed was therefore ex post facto.

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Point B

(Specification of Errors Nos. 5, and 6)

The Circuit Court of Appeals for the Fifth Circuit erred in denying petitioner's petition for a rehearing, said petition being predicated on the Skinner v. Oklahoma sterilization case, and for other errors appearing in the record.

Petitioner respectfully shows that on June 1, 1942, this Court decided the *Skinner v. Oklahoma Case*, No. 782, October term, 1941. The reports did not carry this Court's decision until several days later, and petitioner's late counsel was unable to present argument in this case to the Circuit Court relying on the Skinner case. On June 11, 1942, the Circuit Court rendered its opinion in the instant case, and, in a petition for rehearing, the petitioner's counsel embodied this Honorable Court's decision in the Skinner case as grounds for a rehearing, which subsequently was formally denied by the Circuit Court without any comment.

The Skinner case, which we refer to and rely upon, in our opinion is strictly in point for several reasons. The main reason covers the facts that a special class of offenses was punishable, under the Oklahoma law, by vasectomy (if the offender was a male), and those persons guilty of the prohibitory laws, political offenses, revenue laws, and embezzlement, were exempt from the punishment thereunder said sterilization law. A thrice convicted chicken thief stood before the Oklahoma courts specially condemned. A thrice convicted embezzler bore no such ignominy.

In the present situation, narcotic law violators are singled out by statute as a special class, and if twice or thrice convicted, special aggravated punishment is imposed in an arbitrary and mandatory fashion. The embezzler under the Federal Criminal Code is not within the scope of being so condemned; nor is the counterfeiter, the violator of the Dyer Act, nor the mail robber so condemned. Why this discriminatory statute (Section 2557, 26 USCA)?

Petitioner respectfully submits that the principles involved in the Skinner case which moved this Honorable Court to strike down that Oklahoma sterilization law, are similarly involved herein, and should move this Court to strike down this challenged section.

Conclusion

We respectfully submit that by all the tests, this challenged statute fails to meet the standards of constitutionality. The filing of the information was violative of the Due Process Clause; the "allegations" in said information were ex post facto subject matter; the judgment and sentence imposed was not only ex post facto, but cruel and unusual punishment violative of the Eighth Amendment to the Constitution; and the entire proceeding violated petitioner's rights under Article 1, Section 9, clause 3.

And further, the statute under challenge here, branding a special class of offender, discriminatory on

its face, should be declared unconstitutional as was the statute involved in the Skinner v. Oklahoma case.

Wherefore, we respectfully submit that the decision of the Circuit Court of Appeals for the Fifth Circuit in the instant case was and is in conflict with the decisions of other courts of appellate jurisdiction, and an applicable decision of this Honorable Court; that the decision by the Circuit Court involves important constitutional questions never before settled by this Honorable Court where this particular "habitual criminal law" is involved, and that the same merits this Honorable Court's consideration to the end that the writ of certiorari prayed for herein be granted, and that after reviewing the record and the decision of the Circuit Court that said decision be reversed and this petitioner granted such relief as in the premises seem meet and just.

Respectfully submitted,

CHARLES BELAND,
Petitioner Pro Se.